No. 82-1071

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the Bonneville Power Administration, Department of Energy, and DONALD PAUL HODEL, as Secretary of the Department of Energy, and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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PETITIONERS' REPLY BRIEF

Rather than respond to arguments raised in the Petition, Respondents simply summarize the Ninth Circuit's Opinion

—albeit inaccurately in important respects.[1] Respondents[2] rely upon Section 9(e)(5) of the Act, 16 U.S.C. § 839f(e)(5), which provides the Ninth Circuit with exclusive original jurisdiction to review agency action, in offering two principal reasons for denying certiorari:

1. The impossibility of conflicts among the Courts of Appeal; and

2. The need for this Court to defer to the Ninth Circuit's statutory expertise.

Neither argument succeeds.

Given the Act's exclusive jurisdiction provision, it is obvious—and Petitioners have readily conceded—that no actual circuit conflicts can develop. However, precisely because such actual conflicts are statutorily precluded, it is important that this Court review Ninth Circuit decisions under the Act which conflict in principle with decisions of other Courts of Appeal under analogous federal power marketing statutes. In this regard, Respondents fail meaningfully to address Petitioners' arguments that the Ninth Cir-

[1]For example, Respondents suggest that the Ninth Circuit "held" the subject contract provisions violate not only the Act's "preference clause," but also its limitation on the "amount of power" allocated Petitioners. This is a plain mischaracterization of the Opinion. The Ninth Circuit studiously avoided construing the phrase "amount of power," even though Petitioners argued that their statutory allocation of an "amount of power" was dispositive of the Ninth Circuit's preference analysis (Pet., pp. 25-27). Respondents' attempt now to suggest a second decisional basis for the Opinion is without merit.

[2]Of the parties listed as Respondents (Pet., pp. ii-iii), only the publicly-owned and cooperative utilities have filed a brief opposing certiorari (joined by the Public Power Council, the association to which these utilities belong). The Federal Respondents have filed a brief supporting Petitioners and asking that certiorari be granted.

cuit's Opinion regarding the meaning and application of preference rules under the Act directly contravenes the Sixth Circuit's affirmance in *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956)—the only other decision identified below involving a federal power marketing statute that, like the Act, specifically confers rights to power on both preference and nonpreference customers. Contrary to Respondents' suggestion, the Opinion is not supported by prior Ninth Circuit caselaw. *Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co. v. Santa Clara*, 439 U.S. 859 (1978), upon which the Ninth Circuit principally relied, struck down the sale of power to a nonpreference private utility under a federal statute that contained only a preference clause and provided no allocation of power to nonpreference customers. Neither *Santa Clara* nor any other cases cited by Respondents arise under statutes that allocate power directly to nonpreference customers, and thus simply do not bear upon analysis of this distinctive feature of the Act.[3]

Volunteer Electric Cooperative, on the other hand, arose under the TVA Act, a statute like the Act that contains both a preference clause and a provision specifically authorizing the sale of power to nonpreference industrial

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[3]However, these cases do make clear that even in the absence of direct statutory allocation to nonpreference customers, a "preference clause" does not override other important statutory provisions and purposes (Pet., pp. 16-17). Thus, if anything, these cases further demonstrate that the Ninth Circuit's sweeping view of preference under the Act is plain error.

customers.[4] Neither the district court nor the Sixth Circuit had difficulty upholding TVA's adherence to this statutory scheme against challenge from preference customers:

> Granted the Act states preference shall be given to states, counties, municipalities and cooperatives not organized for profit. However the Act does not end there.

139 F. Supp. at 26.

In short, the Ninth Circuit's Opinion raises a clear conflict regarding the meaning of "preference" under federal power marketing statutes that specifically confer rights to power on both preference and nonpreference customers.

Nor do Respondents demonstrate any need for this Court to defer to the Ninth Circuit's "expertise" in this first case arising under the Act. Centralized initial review of agency decisions in one Court of Appeals is a wholly unexceptional jurisdictional scheme, which was not intended to oust this Court from review and which could not endow the Ninth Circuit with any special understanding of the Act's many technical provisions. Indeed, development of such expertise has always been thought an administrative task, recognized by time-honored principles of judicial review requiring that reasonable interpretations of a statute by the administering agency be upheld. Respondents' assertion that Petitioners merely ask this Court to substitute its views for those of the Ninth Circuit is frivolous. On the contrary, Petitioners seek to resurrect Congress's carefully integrated statutory scheme, and to

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[4]Indeed, while the TVA Act merely authorizes sales to nonpreference industrial customers the Act requires such sales, thus providing an even stronger affirmation of nonpreference customer rights to power.

assure that review by the Ninth Circuit hereafter is properly confined. The Ninth Circuit's utter failure to understand that BPA properly implemented Congress's instructions regarding the "amount of power" to be allocated Petitioners under the new contracts (Pet., pp. 25-27) is but one example of the danger inherent in Respondents' suggestion that this Court allow the Ninth Circuit complete latitude in exercising its "expertise" under this new and highly technical statute.[5]

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Respectfully submitted,

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[5]To persuade the Court that this case lacks importance, Respondents urge that under present economic circumstances Petitioners would not use all the power allocated to them even were the Ninth Circuit's Opinion reversed. This assertion is completely irrelevant to consideration of the Petition. It has always been true that BPA customers, including Respondents as well as Petitioners, decline to purchase power to which they are otherwise entitled during periods when such power cannot productively be used. At issue here, however, are Petitioners' rights to obtain statutorily allocated power as needed during the term of their twenty-year contracts — a term that will span periods of economic vitality as well as recession.